No. 15,645

United States Court of Appeals

For the Ninth Circuit

HAROLD M. KOCH, BESSIE KOCH, WILLIAM L. KOCH, ROSE KOCH, REBECCA KOCH ABEL, MAURICE P. KOCH, and DAISY KOCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

I. JURISDICTION.

This appeal is from a judgment in favor of the United States of America rendered in the United States District Court for the Northern District of California, Southern Division, in an action brought by appellants pursuant to provisions of U.S.C. Title 28, Section 1346(a)(1), for the refund of income taxes alleged to have been erroneously paid, collected and retained by appellee (R. 13-15).

The complaint alleged jurisdiction pursuant to U.S.C. Title 28, Sec. 1346(a)(1) (Supp. R. 383, Paragraph I).

Appellants Harold M. Koch, William L. Koch, Maurice P. Koch and Rebecca Koch Abel are partners in the firm of Koch & Sons, and appellants Bessie Koch, Rose Koch and Daisy Koch are respectively the spouses of the three appellants first named. Each appellant filed separate income tax returns for the years in issue.

Judgment was entered on January 23, 1957 (R. 13-15). A motion for new trial was filed February 1, 1957 (R. 21, 22), and an order denying said motion was made March 5, 1957 (R. 22). Notice of appeal to this Honorable Court was filed with the District Court on April 18, 1957 (R. 32) pursuant to the provisions of Sections 1291 and 1294(1) of 28 U.S.C. and within the time provided by Rule 73(a) of Federal Rules of Civil Procedure, 28 U.S.C.

II. STATUTES INVOLVED.

The pertinent portions of the Revenue Code involved, and in effect at the time in question, are as follows:

1939 I.R.C. Section 23.

"Deductions from Gross Income.

"In computing net income there shall be allowed as deductions: . . .

"(e) Losses by Individuals. In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

"(1) if incurred in trade or business;

. . . . . .

"(k) Bad Debts.

"(1) General rule. Debts which become worthless within the taxable year; . . . This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.

. . . . . .

"(4) Non-business debts. In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term 'non-business debt' means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

. . . . . .

"(s) Net Operating Loss Deduction. For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122."

The pertinent portions of I.R.C. 122 relating to carry-back to previous taxable years of losses subsequently incurred are as follows:

"Sec. 122. Net Operating Loss Deduction.

"(a) Definition of Net Operating Loss. As used in this section, the term 'net operating loss'

means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

"(b) Amount of Carry-Back and Carry-Over.

"(1) Net operating loss carry-back.

"(A) Loss for taxable year beginning before 1950. If for any taxable year beginning after December 31, 1941, and before January 1, 1950, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years. . . .

"(d) Exceptions, Additions, and Limitations. The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

. . . . . .

"(5) Deductions otherwise allowed by law not attributable to the operation of a trade or business regularly carried on by the taxpayer shall (in the case of a taxpayer other than a corporation) be allowed only to the extent of the amount of the gross income not derived from such trade or business."

III. STATEMENT OF CASE.

This action involves a determination as to whether or not the losses incurred by taxpayers in the year 1947 were deductible as losses incurred in the taxpayers' trade or business as provided in 1939 I.R.C. Sec. 23(e)(1) or Sec. 23(k)(1), and in the operation

of their business within the meaning of the "carry-back" provisions of 1939 I.R.C. Sec. 122.

1. The Pleadings.

The complaint alleged, in separate counts for each of the partners and their respective spouses, a loss in the year 1947 attributable to a business carried on in that year. (S.R. 389, paragraph VI; S.R. 393, paragraph VI; S.R. 397, paragraph VI; S.R. 401, paragraph VI; S.R. 404, paragraph VI; S.R. 409, paragraph VII; S.R. 413-414, paragraph VII).

The answer admits that the total sum of $90,000.00 was expended and resulted in loss in the year 1947; however, the answer alleges that the loss was a non-business bad debt and therefore requires tax treatment as a capital loss. (S.R. 417, paragraph 6; S.R. 418, paragraph 12; S.R. 426, paragraphs 2 and 5).

2. The Trial.

All motions, issues and facts were determined by the Court, except that by stipulation (R. 293), a single special interrogatory was submitted to the jury, to-wit:

> "During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?"

3. Fact Pattern.

Three brothers and a sister, members of the Koch family, entered into a partnership agreement on December 31, 1941 (Appendix A, Exhibit 1, R. 35), under the firm name of H. Koch & Sons. Although

the partnership originally conducted a luggage business previously conducted by the father of the partners, the agreement was amended on October 23, 1944 to provide that the partnership would engage *in the business of financing motion pictures* (R. 35, 36, Exhibit 2; portions reprinted in Appendix B).

4. Theories Upon Which the Cause Was Presented.

A. Plaintiffs' theory upon trial of the cause was two-fold: Firstly, that they acted pursuant to their formal partnership agreement (Appendix B) to engage *in the business of financing motion picture ventures,* and that they were so engaged when the loss occurred and are therefore entitled to the deductions provided by 1939 I.R.C. Sections 23(e)(1) or 23(k)(1) and Section 122 as a matter of law; and

Secondly, that the motion picture financing transaction which resulted in loss was not an isolated transaction, and plaintiffs offered proof of extensive activities in similar motion picture financing transactions during the period in question, and urged that time and effort expended in said business should be considered with respect to all transactions and whether or not the same resulted in concluded financing agreements.

B. The Government's theory of the case, in which it was largely supported by the trial Court, was: That only actual investments which were concluded during the exact period in question should be considered in determining whether or not the partnership was engaged in such business, and that the extensive nego-

tiations and time and effort spent in the business which did not result in actual concluded financing within the exact limits of the year in question, were to be disregarded.

IV. QUESTIONS PRESENTED.

1. Charge to the jury: Did the trial Court err in giving instructions contrary to the law, in its failure to give properly requested instructions necessary to a determination of the cause, and in failing to give any properly requested instruction upon plaintiffs' theory of the case?

2. Directed verdict: Was the trial Court in error in granting a dismissal or directed verdict (as the case may be) with regard to part of the relief sought, and particularly when the erroneous ruling affected all other considerations in the cause?

3. Evidence: Was the trial Court in error in its rulings with regard to the admission and rejection of evidence?

4. Findings: Are the findings supported by the pleadings, the evidence, and the stipulations of the parties?

5. Conclusions: Did the trial Court erroneously determine the law applicable to the particular facts and issues presented?

6. Sufficiency of evidence: Is the judgment supported by the evidence?

7. Argument of counsel: Were plaintiffs prejudiced by the misconduct of counsel which misled and inflamed the jury and by reason of which plaintiffs were prevented from having a proper deliberation by the jury?

V. SPECIFICATIONS OF ERRORS.

A. ERRORS IN THE CHARGE OF THE COURT TO THE JURY.

(1) The trial Court instructed:

> "If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf and not on behalf of H. Koch & Sons, that transaction cannot be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures." (R. 302.)

Exception was taken (R. 311, 312). The trial Court had granted a directed verdict (or dismissal) against Maurice P. Koch upon the basis that there was no evidence that he had ever acted in his own behalf, and that all of the evidence and the agreement of the parties conclusively established that all of his acts were on behalf of the partnership (R. 292). After Maurice P. Koch was thus put out of the case, the Government argued the "Janus-faced" plea to the jury that the activities were all the personal activities of Maurice P. Koch in his own behalf and not in behalf of the partnership (R. 353, 354). There was

no theory of fact in the case as a basis for the instruction. The instruction compounded the error of the Court and the prejudicial remarks of counsel.

(2) After extensive evidence was received upon the issues the Court instructed the jury:

> "There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion pictures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by a preponderance of the evidence that they were engaged in the trade or business of financing motion pictures." (R. 301-302.)

This instruction was further impressed by the Court's statement to the jury as follows:

> "Thereafter the Commissioner of Internal Revenue *made a determination* that the loss incurred by H. Koch and Sons was not as the result of a business bad debt but that the loss occurred by reason of a nonbusiness bad debt." (R. 298.)

We acknowledge, with apology, that the record does not contain the argument and authorities submitted upon this subject, except that during defense counsel's argument to the jury (R. 343, 344), and before the Court instructed the jury, plaintiffs objected to the proposition propounded by the instruction, and the ends of justice require consideration of the fatal error involved. Under the decisions of this Honorable

Court, the Commissioner's determination merely shifts the burden of going forward, and once there is evidence, the cause must be decided "upon the evidence and upon the evidence alone." (Note: The trial Court's own findings are based on the alleged "presumption."

(3) The trial Court failed to give to the jury any one of the instructions properly requested by the plaintiffs upon plaintiffs' theory of the case as follows:

> "That in determining whether or not H. Koch & Sons was engaged in the business of financing motion picture ventures, you must consider, among other things, the amount of time and effort expended in that direction, and such time and effort, if any, must be considered by you whether or not an actual venture was concluded."
>
> "That in considering the activities of H. Koch & Sons with relation to the business of financing motion picture ventures, you must consider all activities designed to advance the financing of such projects and you must consider the same whether or not the transactions were actually concluded."
>
> "That in considering the question as to whether or not H. Koch & Sons devoted substantial time to the financing of motion picture ventures you are required to consider all of their activities relating to that purpose, and all activities and efforts actually expended in attempting to negotiate for and in attempting to enter into financial transactions relating to the business of financing motion picture ventures must be considered by you upon this issue, whether the same were concluded or not." (R. 25 and 26.)

Exceptions were taken for the failure to give any one of these instructions (R. 31). The jury was left with the impression that "financing" means paying out money and that all time, efforts and transactions in which actual funds were not disbursed were to be disregarded. The requested instructions express the law and plaintiffs' entire theory of the case.

(4) The trial Court failed to give any one of the instructions properly requested by plaintiffs as follows:

> "In order for one to be regularly engaged in the conduct of a particular business, it is not necessary that he devote a major part or any particular part of his time and efforts to such business. Neither is it necessary that he devote a major portion or a particular portion of his capital to such business in order for it to be deemed to be a business regularly carried on by such taxpayer. . . . etc." (R. 23-24.)
>
> "A taxpayer may be deemed to be regularly engaged in the conduct of a particular business even though he may devote most of his time, efforts, and capital to another business or other businesses." (R. 24.)
>
> "That if you should find that H. Koch & Sons, acting through one or more of its partners, or acting through persons, firms, corporations or representatives appointed by said partnership, has regularly and continuously participated in the promotion and financing of motion picture ventures during the year 1947, then you must find that H. Koch & Sons was engaged in the business of financing and promoting motion pic-

ture ventures and that said business was regularly conducted." (R. 25.)

In the absence of these instructions, as well as any instruction relating to plaintiffs' theory of the law of the case, the jury remained uninformed with regard to any basis upon which it could predicate an answer in favor of plaintiffs.

B. ERRORS OF LAW.

(1) The Court erred as a matter of law in its interpretation of the copartnership contract of the parties (Exhibit 2, Appendix B), and further erred by reason thereof in granting a directed verdict (or partial dismissal) with regard to the claims of Maurice P. Koch and his wife, Daisy Koch.

(2) The trial Court erred in granting a directed verdict (or partial dismissal) with respect to the plaintiffs Maurice P. Koch and Daisy Koch.

C. ERRORS WITH RESPECT TO THE ADMISSION AND REJECTION OF EVIDENCE.

(1) The Court erred in its failure to admit into evidence Exhibit 5 for identification (Appendix D) (the contract between one Coslow and United Artists Corporation for the production and world-wide distribution of a feature film, and providing that Coslow must be the controlling stockholder of the corporation producing same). The loss in question ($90,000.00)

occurred in activating said corporation and in the advancements made for the pre-production costs of the film contemplated by the agreement. The document was finally excluded upon the ground that it had no bearing on the issues of the case.

This document was offered and rejected several times. It was first objected to on the ground that no foundation was laid (R. 46). The foundation was laid (R. 210-212), whereupon the Court refused to admit the document (R. 212). Document offered again and the Court could not find the name of the plaintiffs in the document and refused to permit counsel to explain the interest and beneficiary position of plaintiffs in this agreement (R. 213-214).

(2) The Court erred in its failure to admit into evidence Exhibit 19 for identification (Appendix E) (an unsigned document negotiated to set up a venture for the financing and production of a series of films between plaintiffs and several well known creative persons in the film industry).

The document was offered for the purpose of showing the activities of the plaintiffs in the business of financing motion picture ventures, to show the time and effort expended in negotiations, and as a physical fact indicating efforts expended at the very time in question (R. 79-81), and as a key to the time, effort and expenses incurred. The offer was renewed (R. 84-85) and the purpose clearly demonstrated.

Objection was made on the ground that the document was prepared in the name of the partnership's

wholly owned corporation, Ambassador Productions, and not in the name of the partnership (R. 85). The Court refused admission on its own objection that the document was not executed, i.e., that the actual advancement of funds was not consummated (R. 85).

(3) The Court erred in its failure to admit into evidence Exhibit 21 for identification (Appendix F) (an unexecuted agreement between one of the partnership's wholly owned corporations and Alfred E. Green, dated April 28, 1947, providing for the employment by said corporation of Alfred E. Green in the capacity of director and producer for a series of films over a period of three years). This was also offered to show time expended, and refused because not executed. Objection was made on the ground that the agreement was not with plaintiffs but with their wholly owned corporation. The Court sustained the objection only upon its own objection that the document was not executed (R. 84-85).

(4) The Court erred in its failure to admit into evidence Exhibit 26 for identification (Appendix G), which is the unexecuted contract negotiated in the period in question between Monogram Pictures Corporation and Ambassador Productions, Inc. (plaintiffs' wholly owned corporation) for the financing, production and distribution of a series of films, together with a letter dated September 25, 1947, from Monogram Pictures Corporation to the attorneys for the partnership.

The document was evidence of the time, effort and expenditures incurred in negotiations for a series of

films at the exact time in question. Objection was made that no foundation was laid; and the Court refused admission on the ground that the document was not executed (R. 99-100). Stipulation covered foundation in so far as preparation and receipt of documentation was concerned (R. 99); however, the Court excluded the same upon the ground that the agreement was not executed and concluded (R. 100).

(5) The Court erred in its failure to admit into evidence Exhibit 29 for identification (Appendix H). This exhibit was offered to prove that negotiations for the financing of a series of films to be produced by Monogram Pictures, commenced in September, 1947, were still under way on November 19, 1947 (the period in question). Objection was raised on the ground that the letter from Monogram Pictures was addressed to the attorney for the partnership, who also formed and happened to be a director, with his co-counsel, of the partnership's wholly owned corporation, Ambassador Productions, and upon the ground that there was no showing which of the capacities of the attorney applied in the receipt of this letter (R. 107-108). The Court sustained the objection upon this ground, although the record is completely clear that counsel were acting for the partnership at all times (R. 78, 88-89, 109, 124).

(6) The Court erred in its failure to admit into evidence the check payable to Apex Film Corporation, dated January 26, 1948, and evidence of the details of advances made thereafter. Although the loss in

question occurred in the year 1947 and the transaction for the financing of this large series of films was conducted in 1947 the funds were not advanced until January, 1948. The Court refused to admit the detail evidence of actual funds advanced in 1948 pursuant to arrangements made in 1947 (R. 128-130) although the Court previously ruled, in effect, that only concluded transactions and funds actually advanced were to be considered, and likewise had ruled that only the details of transactions would be admitted (R. 60, 245-246).

(7) The Court erred in refusing Exhibit 24 for identification (Appendix I) (a letter from Annie Laurie Williams, dated October 17, 1946, opening the negotiations for "Hill of the Hawk" by Scott O'Dell).

The letter was admittedly received by counsel for plaintiffs in motion picture transactions (R 92). The Court refused to admit this correspondence showing the commencement of this project which continued as a major activity throughout the entire period, on the grounds of "hearsay" (R. 92-95). The letter was not offered to prove the truth of its contents. It was offered to prove activity.

(8) The Court erred in sustaining objection to testimony offered to show the quantum of time and effort expended in picture transactions.

The Court refused to permit testimony with regard to the number of transactions and the amount of time and effort expended on the grounds of "vague, speculative, and calling for the opinion and conclusion

of the witness". Mr. Koch was asked how many different deals were looked into over a six month period. Defense objected on the grounds, vague and speculative, calling for the opinion and conclusion of the witness. The Court stated,

> "I think in view of the objection he would have to give the individual contacts" (R. 60).

(9) During the course of taking testimony of a disinterested witness who had been present at almost all negotiations, the Court similarly erred in sustaining objection as follows (R. 245-246):

> "Q. (By Mr. Fink.) So far as *your own personal knowledge is concerned,* with regard to the year 1947, approximately what part of Mr. Koch's time did he spend in connection with motion picture activities?
>
> Mr. Gillard. I object to that as calling for the opinion and conclusion of the witness.
>
> The Court. Sustained." (Emphasis ours.)

(10) Although defendants made proof that plaintiffs sold out certain assets some years later, the Court refused to permit testimony to prove that plaintiffs went out of the motion picture financing business only after some years following the time in question (R. 181-182), on the erroneous ground that the question making inquiry as to when they went out of this business called for the conclusion of the witness.

D. SPECIFICATION OF ERRONEOUS FINDINGS.

(1) Finding No. 5 (R. 8) that H. Koch & Sons were in the luggage business is erroneous, confusing and misleading in light of consideration of Finding No. 2 (R. 8). Finding No. 2 determines that the formal agreement of the parties executed in 1944, was in full force and effect at all times and provided that the partnership would engage in the business of financing motion picture productions; whereas Finding No. 5 determines that the partnership was *only* in a different business contrary to the contract and acts of the partners.

(2) The complaint alleges and the answer admits losses in the total sum of $90,000 and not $75,000 as found in Finding No. 6 (R. 8-9). (S.R. 385, paragraph VI; S.R. 405, paragraph II; S.R. 417, paragraph 6; S.R. 426, paragraph 2). The finding is likewise erroneous in that the said finding and the findings as a whole do not dispose of the loss sustained by Maurice P. Koch (and his wife, Daisy) of amounts contributed pursuant to the partnership agreement in excess of the participation by the other partners. This finding also fails to show that the partnership was in fact the largest owner of interest in the film. The finding is not supported by the evidence.

(3) Finding No. 8 (R. 9) assumes that the plaintiffs are bound by the findings of the Collector of Internal Revenue. Such a presumption or inference is a mere rule of evidence or of "going forward" and disappears upon the introduction of evidence. Here

we have the glaring error of the trial Court in making a finding based upon an alleged presumption; whereas this Honorable Court has repeatedly held that the "presumption" disappears upon the introduction of evidence, and that when evidence has been introduced, determinations must be made upon the evidence and upon the evidence alone.

(4) The Court erred in Finding No. 9 (R. 10) that the loss resulted from a non-business bad debt. This finding is not supported by the evidence. The finding is erroneous in that the ultimate fact to be found by the Court is whether or not the loss incurred was *attributable to the operation of a trade or business conducted by the plaintiffs* (1939 I.R.C. Sec. 23 (e)(1), Sec. 23(k)(1), Sec. 122(d)(5)).

(5) The Court erred in its Finding No. 10 (R. 10) to the effect that Maurice P. Koch was not engaged in the business of financing motion picture ventures. He was thus engaged pursuant to the express terms of the partnership agreement and all his acts were conducted as manager of the partnership business.

(6) Findings Nos. 11 and 12 (R. 10) find that by stipulation of the parties all of the salient and ultimate issues were withdrawn prior to submission of the case to the jury. No such stipulation was made and no issues were withdrawn. Only one special interrogatory was agreed upon and the parties carefully preserved by stipulation that all other facts and issues would be passed upon by the Court (R. 293). These findings also incorrectly interpret the allegations of the complaint.

The ultimate issue of fact in the entire cause is the determination as to whether or not the loss incurred was attributable to the operation of a trade or business. Findings 11 and 12 are only an attempt to hurdle the requirement of a finding on this, the ultimate issue of fact in the case, by substituting or adding stipulations which were not made, and by erroneous interpretation of the complaint.

(7) Finding No. 12 (R. 10, 11). The Court finds that a stipulation was made that limited plaintiffs' basis of recovery. No such stipulation was made and the record demonstrates the contrary (R. 293). The only interrogatory upon which the parties could agree was as quoted; however, the stipulation clearly preserved the duty of the Court to pass upon all other questions of fact, as well as law, and the duty of the Court to resolve all of the ultimate issues in the case.

(8) The Findings as a whole are erroneous in that they fail to find upon the ultimate fact in the case, to wit: Was the loss incurred "attributable to the operation of a trade or business?"

(9) The Findings as a whole are in error because they are based upon alleged stipulations which were not in fact made.

(10) The Court erred in its failure to make a finding as proposed by plaintiffs' number 4 (R. 17):

> "The said Maurice P. Koch was entitled to share proportionately to the extent of the sum of $75,000 contributed by the partnership and entitled to a separate share for the additional funds advanced by him and which were not matched by the remaining partners."

E. ERRONEOUS CONCLUSIONS OF LAW.

(1) Conclusion No. 1 (R. 11) is in error in that the Court concluded that the loss was not incurred in the trade or business of H. Koch & Sons. Proper interpretation of the agreement and acts of the parties (Ex. 2, Appendix B) requires the conclusion that the loss was incurred in the trade or business of H. Koch & Sons. The conclusion is erroneously based upon the Court's finding in accordance with an alleged "presumption" that the Commissioner of Internal Revenue had made a correct determination.

(2) Conclusions of law Nos. 2, 3, 4, 5, 6 and 7 and each of them (R. 9-10) are in error for reasons as follows: (i) The same are based upon findings which are not supported by the evidence; (ii) The same are based upon stipulations which are non-existent and which are contrary to all intendments of the record; (iii) The same are erroneous because they are contrary to an appropriate legal interpretation of the written agreement of the parties; (iv) The same are contrary to the content, allegations, admissions and issues as framed by the pleadings; (v) They are based upon an alleged presumption favoring the Commissioner which erroneously survived all evidence in the cause; (vi) The Conclusions as a whole fail to conclude the law upon the ultimate legal issue in the case, to wit, Was the loss involved attributable to the operation of a trade or business?

F. THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE.

The evidence is susceptible to only one reasonable interpretation, to-wit, that appellants' loss was incurred in the course of activities attributable to the operation of their business. The judgment is based upon stipulations, assumed and which do not exist, upon improper findings and erroneous conclusions. The judgment is based entirely upon an erroneous concept of the effect of the alleged "presumption" of correctness of determinations by the Commissioner of Internal Revenue. Once the several decisions and rules of this honorable Court are applied, the alleged presumption must fall, leaving all of the evidence overwhelmingly favoring plaintiffs.

G. PLAINTIFFS' CAUSE WAS PREJUDICED BY MISLEADING AND INFLAMMATORY STATEMENTS MADE BY COUNSEL FOR THE RESPONDENT.

The prejudicial and inflammatory statements by counsel for defendant caused a miscarriage of justice. Statements that this was plaintiffs' second crack at the case because plaintiffs had already lost the case once before the Commissioner; that plaintiffs' counsel were merely laying down a smoke screen, etc., and these statements being made by a representative of the people could hardly make for justice.

VI. ARGUMENT.

A. THE FACTS.

Appellants, Maurice P. Koch, Harold M. Koch and William L. Koch, were brothers, and appellant

Rebecca Koch Abel is their sister. The remaining appellants are the respective wives of the brothers. On December 31, 1941, the brothers and sister formed a partnership (R. 35, Ex. 1, Appendix A), under the style of H. Koch & Sons. The partnership became the successor to a luggage manufacturing business previously conducted by the father of the partners (R. 45). The brothers Harold and William were shop workmen, Rebecca kept the books, and Maurice (also referred to as Murray) (R. 266) was the general manager and so-called "boss" or "outside man" (R. 266). He received special compensation and privileges (Ex. 1, Appendix A) and was completely in charge (R. 44, 45) to the extent that partnership dealings and written documents were quite often in his own name (R. 72, 76). Pursuant to agreement (Ex. 2, Appendix B) all documentation in the picture business was drafted in the name of Maurice P. Koch and the partnership style is not mentioned (Plaintiffs' Ex. Nos. 10, 12, 14, 16, 17 in evidence, Appendix K, L, M, N and O, respectively). The funds, which were admittedly lost, were disbursed from the partnership upon checks generally signed by Rebecca, and at times by Maurice (Plaintiffs' Ex. Nos. 6, 8, 10A and 13 in evidence, Appendix P, Q, R and J, respectively). It was clearly established that all references to Maurice P. Koch refer to the partnership (R. 43, 101); that whenever Maurice refers to "my people" he is referring to his partners (R. 56, 57); that he executed the documentation on behalf of the partnership, although the same was in his own

name (R. 72); that although he was expressly authorized in writing to conduct the transactions in his own name, there was also a practice to use his name instead of the name of the partnership (R. 76); that when he organized corporations to further the motion picture investment projects, he was at all times acting and signing on behalf of the partnership although his own name appeared (R. 96, 97). During all of the times mentioned, and throughout all motion picture transactions, Maurice acted for, and only on behalf of, H. Koch & Sons, a copartnership (R. 112); although stock of corporations engaged in motion picture activities stood entirely in his name, the stockholder was in reality the partnership (R. 122, 123, 124); in addressing Maurice in the record or otherwise, the use of the word "you" indicated H. Koch & Sons (R. 101, 125); and the attorneys engaged for picture purposes in fact represented H. Koch & Sons (R. 78, 88-89, 109, 124, 191).

Maurice P. Koch's lifetime associations, friendships and relationships were in the motion picture business (R. 37). In 1944 the activities of H. Koch & Sons were quite limited, and generally related to the luggage business (R. 267). Competition was extremely keen and the future appeared bleak for that industry (R. 181).

The decision of the partnership to engage in the business of financing motion pictures is fully confirmed by two formal documents both bearing date of October 23, 1944, some three years prior to the particular loss in question, as follows:

(1) The written amendment to the partnership agreement (Ex. 2, Appendix B), which provides that the partnership will engage in the business of financing motion picture ventures by each and every means, and that all partnership resources be available to this purpose.

(2) On the same date upon which this partnership agreement was entered into, the partners formed "Producers Syndicate" (R. 36, 37, Ex. No. 3, pertinent portions reprinted in Appendix C).

The trial Court found (Finding No. 2, R. 8) that the partnership agreement providing that the partnership was engaged in the business of financing motion pictures, was in full force and effect at all times. After executing this partnership agreement, all of the activities of Maurice P. Koch in connection with the motion picture field were conducted pursuant to the authority contained in the agreement (R. 139, 140). His time, effort and expenses in motion picture matters were all paid for by the partnership (R. 112, Ex. 2, Appendix B). H. Koch & Sons were primarily interested in the "pre-production" phases of motion picture financing;[1] that is, in supplying the funds

[1]Pre-production financing presents the greatest risk and therefore also offers the highest rate of return. The partners all agreed to this type of pre-production financing (R. 42). Pre-production money is also sometimes referred to as "front money" (R. 226, 227) for the purpose of forming the company, acquiring rights to literary properties and artistic talents and facilities. All transactions were in the so-called independent field of the motion picture industry, and for the most part were in the "pre-production" phase (R. 40, 42, 196, 226, 227, 229, 230).

necessary to prepare and develop motion picture projects ("packaging"), as distinguished from actual film production.

It is expected that "front money" will be repaid when the picture is produced and the partnership intended to revolve its funds from picture to picture (R. 40, 42, 196, 226, 227, 229, 230). Partnership cash was limited (R. 180, 273); nevertheless, the partnership was using substantially all of its funds in this manner. The unfortunate and admitted loss created delays and difficulties in concluding financing arrangements on subsequent films in 1947, because these frozen and ultimately lost funds could not be revolved into additional planned projects.

The complaint alleges (S.R. 385, paragraph VI; S.R. 405, paragraph II) and the answer admits (S.R. 417, paragraph 6; S. R. 426, paragraph 2) that of the total funds utilized by the partnership in activating Beacon Pictures and its film "Copacabana", $90,000 became a complete loss in the year 1947.

Appellants contend that their agreement to engage in the business of financing motion picture ventures, plus the fact that they acted thereunder, was adequate, as a matter of law, to establish that the loss which occurred was "attributable to the operation of their trade or business". The trial Court did not concur in this contention. Appellants thereupon offered extensive evidence of the activities of the partnership in motion picture financing, and demonstrated a constant, continuous course of such business, and exten-

sive and valuable time, efforts and funds expended (limited by the trial Court's rulings).[2]

The evidence established that in the year 1947, extensive, valuable and consistent time, funds and efforts were expended on the Beacon Pictures' "Copacabana" (R. 63, 67, 68, 75, 76, 77, 80, 132, 134, 159, 191, 192, 201, 202, 208, 209, 210, 213, 214, 215, 216, 218, 220, 221, 231, 247). That constant and repeated activities, time, efforts and funds were expended during the exact period in question with regard to many film projects is demonstrated by the record:

Ambassador Films (R. 81, 82, 83, 85, 86); The Alfred Green Negotiations (R. 77, 78, 83, 84, 87); The Jack Chertok Venture (R. 89, 90, 91, 195, 196, 238, 239, 240); The Producers Finance Venture (R. 95, 97, 165, 166, 183, 184, 192, 193, 194, 198); The Hill of the Hawk Venture (R. 91, 93, 94, 95, 108, 110, 113, 114, 122, 123, 124, 161, 176, 240, 241, 242, 243); Long November (R. 62); The Fred Fisher Story (R. 82, 104, 106, 234, 235); The Monogram Series (R. 98, 99, 100, 107, 111, 112, 236, 237); Thirty Government Training Films (R. 91, 92, 125, 126, 127, 128, 129, 130, 197, 198 199, 244); Apex Films Corporation (R. 173, 174).

When we consider that each production is a major effort, requiring time to formulate, and when we consider the same in proportion to the resources of H. Koch & Sons, this was indeed an overwhelming show-

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[2]The rulings of the trial Court are noted in the exceptions to the rulings on the evidence, *supra*, and in the discussion of same, *infra*. Considerable and most cogent testimony and documentary evidence was excluded by the trial Court's rulings.

ing. We seriously doubt that any independent individuals, in the field of financing motion picture ventures throughout the world, did as much during the period in question. Appellants urge that these facts be considered in the light of the *written agreement of the partners to engage in the business of financing motion picture ventures.*

Although delayed and hampered by the unfortunate loss in 1947, the partnership continued to raise money by each and every means and use its resources for financing motion pictures. The record (citations above) discloses that as the year 1947 came to a close, the partnership was most active: The Monogram Series was pending; Ambassador Productions purchased "Hill of the Hawk" and was preparing it for filming, the Apex Films' arrangements for the production of more than thirty Government training films was underway; Producers Finance was owned and controlled by the partnership and was advancing funds; Ambassador Productions was wholly owned and controlled by the partnership; large bank borrowings were arranged; and activities were constant.

The income of the individual partners of H. Koch & Sons in the year 1947, and before deducting the $90,000 loss incurred in the Beacon transaction, was in the sum of $4,805 each, and the company had no funds (R. 180, 273). Under these circumstances, we particularly note the fund raising efforts and the very substantial funds which were expended and contributed in the course of motion picture financing ventures as disclosed by the entire record (R. 13, 53, 55,

58, 59, 66, 68, 69, 70, 73, 74, 91, 92, 116, 154, 163, 263, 264, 271, 116, 117, 118, 119, 122, 123, 124). The lack of funds and earnings from other sources, when compared with the amounts involved in motion picture activities, dramatically emphasizes the fact that motion picture activity was all important, and "related to the business" of the partnership and not an "isolated or casual" investment. Valuable time was expended not only by the partnership but also by their attorneys in San Francisco as well as in Los Angeles, and by representatives appointed by them (R. 43, 50, 78, 109, 127, 152, 189, 193, 200, 245, 257).

B. THE PARTNERSHIP AGREEMENT.

The written partnership articles provided that the partnership would engage in the business of financing motion pictures (Ex. 2, Appendix B). The trial Court found that the agreement was in full force and effect at all times (Finding No. 2, R. 8). We note, particularly, that the partnership did not attempt at any time to receive "capital gain" treatment with regard to its operations relating to films. However, and for example only, if the partnership had profited in the year 1947 from the sale of an interest in a film, obviously it could not obtain "capital gain" treatment with regard to such sale. It would be foreclosed from "capital gain" treatment by the very terms of its partnership agreement providing that it was in this business. Certainly the taxing authorities would not permit "capital gain" treatment from a sale of an

interest in a motion picture venture to one who has an agreement with another *to engage in the business of financing motion picture ventures.* Having decided to be in such a business, its profits are classified as ordinary income as a matter of law. Therefore, it cannot be maintained that its losses are not likewise related to the operation of its business.

The agreement provides (Ex. 2, Appendix B): (1) That the partnership engage in the business of financing motion picture productions; (2) All assets (funds and credit) of the partnership were made available for this business; (3) Any money advanced by an individual partner over and above sums advanced by the partnership are first refunded to the partner making the advance, and such partner receives a proportionately large share of the profits and losses.[3]

4. Maurice P. Koch is to manage this part of the business in his own name or otherwise and all of his expenses incurred are paid by the partnership.

The loss was admitted. The complaint pleaded in its various counts loss of the total sum of $90,000. The answer admitted the loss thereof in the year 1947.

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[3]This does not mean that by making an additional contribution or borrowing for the partnership the particular partner is acting outside the scope of the partnership activity. In this respect the trial Court was considerably confused and in error in its interpretation of the agreement and the pleadings. The complaint alleges that the sum of $15,000 was advanced by Maurice P. Koch *in the same manner* as the funds which were advanced generally by the partnership (S.R. 405, Paragraph II). All of the funds lost were disbursed from partnership funds, by checks drawn upon the partnership, including the sum for which Maurice P. Koch is entitled to additional loss credit.

The Court found, contrary to the issues framed by the pleadings, that only $75,000 was lost (Finding 6, R. 8-9).

C. INSTRUCTIONS.

1. The trial Court erred in giving instructions contrary to the law combined with prejudicial misconduct of counsel.

(a) In view of the failure on the part of the trial Court to give proper application to the partnership agreement which provided that the partners were in the business of financing motion picture ventures, evidence was introduced showing that the activities of the partnership were sufficient, even in the absence of such agreement, to remove the situation from an "isolated" transaction, into a loss "attributable to the operation of a trade or business". The activities, the number thereof, continuity, time, effort and intent, all became probative factors in the case.

The trial Court erroneously charged as follows:

> "If you believe that Maurice P. Koch used his own money in any transaction and was acting therein in his own behalf, that transaction cannot be considered by you in determining whether the partnership of H. Koch & Sons was engaged in the business of financing motion picture ventures." (R. 302.)

The record was as follows:

(i) The evidence was clear and without contradiction that each and all of Maurice P. Koch's acts were for and on behalf of the partnership (see supra; also R. 43, 44, 45, 72, 76, 96, 97, 101).

(ii) The written terms of the agreement of the partners established as a matter of law that Maurice P. Koch could only act for the partnership. Not only did the amended partnership agreement (Ex. 2, Appendix B) so provide, but the original partnership agreement (Ex. 1, Appendix A) required that he devote his exclusive and full time and effort to partnership activities.

(iii) Maurice P. Koch borrowed $15,000 and contributed same to partnership funds in order to make that amount available to the partnership to cover some of the motion picture expenditures previously made (R. 287). Therefore, Maurice P. Koch and his wife sought recovery for this additional $15,000 loss suffered by them pursuant to the partnership agreement (Appendix B). However, the court misinterpreted the agreement, and erroneously held that in order to receive credit for the additional $15,000 loss, Maurice P. Koch had to be individually engaged (as distinguished from the partnership) in the business of financing film ventures. Admittedly, he was not individually engaged in any business and that all of his activities were for the partnership. Therefore, the Court granted a directed verdict (or dismissal) as to Maurice P. Koch's claim for allowance of the additional $15,000 loss suffered by him (and his wife), without hearing from appellants on this matter. (R. 292).

The pleadings admtited that the $15,000 especially attributable to Maurice P. Koch as well as all other sums making up the $90,000, were expended and lost.

The defense attempted to amend their pleadings (R. 290) and this motion was denied (R. 292) with the result that at the time the cause was submitted to the jury the loss of the entire $90,000 was admitted by the pleadings. Although the Court was in error, this ruling of the Court, coming after plaintiffs rested, clearly established that the Court held as a matter of law that there was no evidence in the record that Maurice P. Koch ever acted in his own behalf. Note, also, the discussions with the Court which occurred at the time the exceptions to the challenged instruction occurred (R. 311, 312), at which time counsel for appellants stated:

> "We also except with respect to the instruction given by the court that the jury may disregard all the activities of Maurice Koch if such activities involve only him, his own funds, it having been particularly held by this court that as a matter of law all of Maurice Koch's activities in the motion picture business, the business of financing motion picture ventures, were for and on behalf of the partnership rather than his own behalf and a motion having been granted by reason thereof.
>
> The Court. Very well."

This error in charging the jury was magnified by the defense argument that Maurice P. Koch's activities were in his own behalf, and not in behalf of the partnership, and that the jury should *not* consider his activities in determining whether or not the partnership had activity attributable to the particular trade or business. The Government thus took ad-

vantage of the benefits of the motion for a directed verdict which was erroneously granted by the Court on the basis that he was not, at any time, acting in his own behalf, and under these circumstances it was, indeed, unconscionable for the Government to then argue that Maurice P. Koch's activities were in his own behalf and that the jury must, therefore, disregard the same (R. 349, 352, 353, 354).

The error in the instruction is likewise emphasized by the fact that the partnership agreement (Appendix B) provides that Maurice P. Koch is in charge of all film business and that this phase of the business could be carried on in his own name. When the jury took the exhibits to the jury room, they found that all of the documents were in the name of Maurice P. Koch, and no doubt, under the Court's instruction, disregarded his constant activities as well as all of the documentation.

It is erroneous to instruct a jury when there is no evidence to support the theory of fact which the instruction assumes. See *Case of Tweed,* 83 U.S. 504, 16 Wall. 504, 21 L.Ed. 389 (1873); *McCarthy v. Pennsylvania R. Co.,* 156 F.2d 877 (7th Cir.), (1946).

(b) The Court instructed the jury (R. 301-302):

> ". . . there is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion picture ventures is correct. The burden is upon the plaintiff to overcome the presumption of the correctness of the Commissioner's determination by proving by

> a preponderance of the evidence that they were engaged in the trade or business of financing motion pictures. By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force . . .", etc.

The instruction is clearly in error under the law. In the *absence of evidence* to the contrary, there is a presumption of correctness in favor of the Commissioner, but once evidence is introduced, the presumption fades and vanishes and the case is as wide open upon the evidence as though there had been no determination by the Commissioner, and the case must be decided "upon the evidence, and from it alone".[4]

In *J. M. Perry v. Commissioner,* 120 F.2d 123 (1941), C.C.A.9, this honorable Court stated, at page 124 with regard to such "presumption" as follows:

> "This finding is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issues depend *wholly* upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determi-

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[4]*Redfield v. Eaton* (D.C.) (1931), 53 F.2d 693, at p. 696:
"No one doubts that his decision is sufficient basis for the additional assessment and levy, thus casting on a plaintiff who brings the controversy into court the burden of proof upon all material allegations of the complaint. But that the Commissioner's decision, resting on evidence not presented to the court—in this case the defendant offered not a single witness—has the quality of probative evidence in determining the preponderance of evidence, is a proposition supported neither by authority nor reason."

nation as evidence of its correctness either directly *or as affecting the burden of proof.*" (Emphasis ours.)

Citing:

Welch v. Helvering, 290 U.S. 111, 115, 54 Sup. Ct. 8, 78 Law Ed. 212;

Helvering v. National Grocery Co., 304 U.S. 282, 294, 295, 58 Sup. Ct. 932, 82 Law. Ed. 1346;

Helvering v. Talbot Estates, 4th Circuit (1940), 116 F.2d 160, 162.

This honorable Court clearly enunciated the rule in the case of *San Joaquin Brick Co. v. Commissioner of Internal Revenue,* 130 F.2d 220, C.C.A. 9 (1942), at page 225:

"It has often been pointed out that in claiming tax deductions the taxpayer must show clearly that he comes within the statute allowing such deductions. But once he presents competent and relevant evidence on every necessary element, the presumption of correctness of the Commissioner's determination *is no longer existent* and the outcome of the case depends upon the determination of the trial body after the consideration of the evidence brought before it by both sides." (Emphasis ours.)

And this honorable Court subsequently stated in *Hemphill Schools v. Commissioner of Internal Revenue,* 137 F.2d 961, C.C.A. 9 (1943) at pages 963, 964, as follows:

"Whether that determination was correct or incorrect was the principal, if not the sole, issue in the case. The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct. *Evidence was produced.* Some of the evidence produced by the petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, *the presumption ceased, and thenceforth the issue depended 'wholly upon the evidence'.* It thus became the duty of the Board to find *from the evidence, and from it alone,* whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board treated the *presumption (which no longer existed)* as if it were evidence, weighed it against petitioner's evidence and concluded that petitioner's evidence did not 'overcome' it.

Decision vacated and case remanded, with direction to (1) find from the evidence, *and from it alone,* whether petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business." (Emphasis ours, as well as this Court's in certain instances.)

In *Lawrence v. Commissioner of Internal Revenue* (1944) (9th C.C.A.), 143 F.(2d) 456, this Court held that the presumption disappears when evidence is introduced sufficient to establish a prima facie case. We are constrained to observe that the policy of the

law cannot permit the extension of any rule whereby the person sued becomes the judge in the same lawsuit.

This unfortunate and devastating error in instructions occurred after the law upon the subject was argued to the Court and followed upon the heels of argument by the Government to the jury as follows (R. 344-345):

> "In this case, and the Court will so instruct you, I believe, there is a presumption that the Commissioner of Internal Revenue's determination is correct. You see, the plaintiff already had one crack at this case. He filed his claim for refund with the Commissioner of Internal Revenue and the Commissioner denied it.
>
> Mr. Fink. Your Honor, I am going to enter an objection. We have not tried this case before. This is a lawsuit in itself.
>
> The Court. This is the first time the case has been tried, counsel is correct, a claim has been filed.
>
> Mr. Gillard. I will amend the word case and say 'matter'. In connection with this claim for this deduction the matter has been previously presented by the plaintiff to the Commissioner of Internal Revenue and contrary to what Mr. Fink told you what the Commissioner of Internal Revenue said was 'No, you do not have a business bad debt, you have a non-business bad debt', and the Court will instruct you, I believe, that what a non-business bad debt means is that the parties were entitled . . . and in denying the claims made by plaintiffs, the Commissioner of Internal Revenue allowed each one of these plaintiffs on their tax returns for 1947 a deduction . . ."

And at the very closing final appeal, the Government stated to the jury:

> "We submit to you, Ladies and Gentlemen, the finding of the Commissioner of Internal Revenue, who was a duly and regularly appointed executive officer of the Government, sworn to administer internal revenue laws, that his finding that this was a non-business bad debt, and under the Internal Revenue Code provisions that each of the seven parties to this action were entitled to take a deduction of $1,000 per year against ordinary income for six years, was the correct conclusion in this case . . ." (R. 370-371).

By this argument, fortified by the erroneous instruction of the Court which followed, the jury were in effect told that their sworn officers at law had made a determination and knew more about the income tax system than the jury could ever know and that the determination was correct and remained correct and was sufficient to overcome all evidence offered against it.

The situation here is a far cry from the rule of this honorable Court that "the commissioner's determination is no longer existent" . . . "the issue depended wholly upon the evidence" . . . "Find from the evidence, and from it alone . . ." etc. This erroneous instruction, combined with prejudicial misconduct of counsel, requires reversal.

(Note: The Court made its own findings and conclusions based upon the erroneous concept that the presumption continued, persisted, and pervaded all.)

2. The trial Court erred in its failure to give properly requested instructions necessary to a determination of the cause and in failing to give properly requested instructions upon plaintiffs' theory of the case.

In the absence of an agreement and other tangible evidence, the Courts have resorted to an analysis of the activities of the person involved to ascertain whether or not the transaction was related to a business.[5]

Not only did the four parties agree to engage in the business, but they actually so engaged in the busi-

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[5]In the absence of agreement, apparently the determination of whether one is engaged in a business turns upon the extent of his activities in the field in question.

Dalton v. Bowers, 287 U.S. 404, 53 S. Ct. 205, 77 L. Ed. 389;
Burnet v. Clark, 287 U.S. 410, 53 S. Ct. 207, 77 L. Ed. 397;
Maloney v. Spencer, 9th Cir., 172 F.2d 638;
Daily Journal Co. v. Commissioner, 9th Cir., 135 F.2d 687;
Miller v. Commissioner, 9th Cir., 102 F.2d 476;
Commissioner of Internal Revenue v. Boeing, 9th Cir., 106 F.2d 305, certiorari denied 308 U.S. 619, 60 S. Ct. 295, 84 L. Ed. 517;
Harvey v. Commissioner, 9th Cir., 171 F.2d 952;
Fackler v. Commissioner, 6th Cir., 133 F.2d 509;
Kales v. Commissioner, 6th Cir., 101 F.2d 35;
Foss v. Commissioner, 1st Cir., 75 F.2d 326;
Commissioner of Internal Revenue v. Stokes' Estate, 3rd Cir., 200 F.2d 200;
Campbell v. Commissioner of Internal Revenue, 11 T.C. 510;
Henry R. Sage v. Commissioner of Internal Revenue, 15 T.C. 299.

Our search does not reveal any instance of similar tax contention where two or more people have agreed to engage in a certain business and have acted accordingly. The authorities hold that when a loss is suffered by reason of membership in a partnership, such loss is attributable to the trade or business of the partnership. It has been so held in instances upon termination of a partnership business when one partner remains indebted to the other and the indebtedness becomes uncollectible. In these cases the creditor was not engaged in the business of selling business interests or of terminating businesses. Nevertheless, the Tax Courts have held that losses resulting from an indebtedness by one partner to an-

ness pursuant to the agreement, and with a degree of regularity and continuity far and beyond that which is ordinarily to be found in the particular business in which they engaged.[6]

In view of the trial Court's rulings that appellants' written agreement, under which they at all times acted, did not, as a matter of law, establish that the particular loss was attributable to their trade or business, appellants presented evidence, and most of the record is devoted to a showing of a course of conduct by delineating activities.

We note that we are dealing with intangible "front money" activities in an intangible business where many ideas are started and few become finalized, where most efforts result in failure, and normally result in endless delays.

The defense argued that the jury should disregard all of the activities of the partnership devoted to the

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other are business bad debts, and therefore deductible in full (see *Davis v. Commissioner of Internal Revenue,* 11 T.C. 538. *Depuy v. Collector of Internal Revenue,* 55,081 Prentice Hall T.C. Memo., Docket No. 50,352 (1955).)

Corporations may deduct all of their losses including bad debts of every kind. Apparently, the theory underlying this rule is that clearly corporations are engaged in business. The same rule of reason should apply to a partnership. It would appear unnecessary to require a search for details, which under the clear concept of the law of evidence can only be admitted for the purpose of showing intention by proof of overt acts when in fact the parties have stipulated their intentions in formal writing and have acted accordingly.

[6]E.g., if four attorneys agree to practice law, they are clearly engaged in the law practice whether they ever conclude a case or not. Thus, also, if four persons agree, in writing, to erect suspension bridges and actually make numerous attempts to promote and sell the same, they are in that particular business, whether the bridges are ever built or not.

purpose of financing motion picture ventures unless such activities actually resulted in concluded substantial financing during the exact period in question (R. 369).

Appellants' proffered evidence, theory of the case, and argument were based upon the proposition that the activities, time, effort and money expended must be considered so long as the same related to the business of financing motion picture ventures and whether or not actual ventures were concluded and financed within the exact year in question. The ultimate question of fact is whether or not the loss occurred in the course of activities attributable to a particular trade or business.

Under these circumstances, appellants presented proper instructions upon the subject (R. 23, 24, 25, 26) and upon appellants' theory of the case. These instructions were proposed in order to give the jury some basis for its consideration of the substantial portions of the trial devoted to the activities of the partnership. The instructions were absolutely necessary as a basis for consideration of matters as follows:

1. The amount of time necessary to be devoted;[7]

2. Amount of capital necessary to be devoted;

3. Whether or not more than one business may be conducted by a partnership;

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[7]One may be engaged in a particular business although he devotes the major portion of his time and capital to another business (*Snyder v. Commissioner* (1935), 295 U.S. 134, 55 S. Ct. 737, 79 L. Ed. 1351; *Maloney v. Spencer* (C.C.A. 9) (1949), 172 F.2d 638).

4. Carrying on a business by devoting the time and attention of employees, agents, lawyers and representatives as distinguished from personal time;

5. That it was not necessary that transactions be *concluded* within the exact period in order that the devotion of time, effort and expenditures with respect thereto be considered; and

6. That it was not necessary that the transactions be concluded within the exact limits of the year 1947, in order for the jury to consider the time, effort and expenditures with relation thereto during the year 1947.

The failure to give the requested instructions (R. 23-26), or any of them, left the jury virtually uninstructed.

Each party is entitled to have his theory of the case submitted to the jury if there is any evidence to sustain it, and the theory of each party should be stated with equal completeness and clearness.

88 *C.J.S.* Trial Sec. 301b, pp. 816, 817;

53 *Am. Jur.* 487, 488, Trial Sec. 626;

Aetna Life Insurance Co. v. Moore, 231 U.S. 543, 34 Sup. Court 186, 58 L. Ed. 356 (1913).

In *Chicago & N. W. Ry. Co. v. Green,* 164 F.2d 55 (C.C.A. 8, 1947), the Court stated:

> *"It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made."* (Emphasis ours.)

The Court did not give the jury any instruction upon which to predicate a finding or a "Yes" answer to the interrogatory propounded.

Also the following instructions consistent with the evidence and proper theory of the case was requested (R. 25) and refused.

> "That if you should find that H. Koch & Sons, acting through one or more of its partners, or acting through persons, firms, corporations or representatives appointed by said partnership, regularly and continuously participated in the promotion and financing of motion picture ventures during the year 1947, then you must find that H. Koch & Sons was engaged in the business of financing and promoting motion picture ventures and that said business was regularly conducted."

D. THE COURT ERRED IN GRANTING A DIRECTED VERDICT (OR PARTIAL DISMISSAL) AGAINST MAURICE P. KOCH AND DAISY KOCH.

It is not clear whether the Court granted a partial dismissal or directed verdict against Maurice P. Koch and his wife.

The trial Court, for the most part on its own initiative, granted a directed verdict, or dismissal against Maurice P. Koch with regard to a loss admittedly suffered by him in the sum of $15,000.00 (R 292). All amounts were advanced by H. Koch & Sons, the co-partnership. After having advanced said funds, it appears that the partnership was short of funds

and Maurice P. Koch personally borrowed $15,000.00 and contributed the same to the partnership (R. 287-8). The Court was in error in not finding that the $15,000.00 loss was attributable to the partnership business. The error no doubt arose because of the failure of the Court to properly interpret the partnership agreement, as previously noted.

Even in the absence of the partnership agreement, the $15,000.00 loss was a business loss.

In *Harding v. United States,* 113 Fed. Supp. 461 (1953), the plaintiff was a member of a partnership and personally borrowed funds and made a personal loan of the same to a third party with which to purchase a seat on the stock exchange for the purpose of promoting the interests of the brokerage partnership of which plaintiff was a member. The Court at page 463 of the opinion stated:

> "Plaintiff's sole purpose in borrowing the money was to promote the interests of this partnership. Plaintiff's business was carried on through the partnership, and the loan therefore was made to promote plaintiff's business. The loss of a portion of the loan was, therefore, directly attributable to the carrying on of plaintiff's business."

E. ERRORS IN RULING ON THE ADMISSIBILITY OF EVIDENCE.

(1) The advancement of the funds lost were made more than ten (10) years prior to trial and the actual loss occurred more than nine (9) years prior to trial.

By agreement (Ex. 2, Appendix B) all activities of the partners in relation to motion picture finances were conducted by Maurice P. Koch. At the time of trial it became essential to determine the amount of time expended by him. The Court did not permit Maurice P. Koch to testify to the number of transactions in which he participated (R. 60). The Court held that it would be necessary to go into the details of each transaction without specifying any particular number or general continuity of time expended. The ruling was erroneous and eliminated the most pertinent and cogent testimony in the case. To make detailed moment by moment proof of activities and the contents of conversations and conferences conducted ten years prior to trial would result in hopeless confusion (e.g., if we were establishing the experience of a trial lawyer under the rule of evidence prescribed by the trial Court, we would be required to go through the exact details of each law suit in which he was ever engaged). Appellants were required, as a practical matter, to adopt some limits with regard to details, because to make proof in a trial Court of the details of activities which required more than one year for their occurrence, would, no doubt, require considerable unnecessary weeks and months to delineate by way of admissible testimony in a court room. Attempts by appellants to comply with this ruling did not fare well. Appellants sought to introduce documentation which resulted from interminable negotiations, conversations, discussions, trips, telephone calls, efforts of counsel and others and the

trial Court excluded the same. The jury were entitled to draw the reasonable inference from the very nature of the documentation, the many terms and provisions involved, the meticulous care in which the same were documented, the fact that in most instances several large feature films were projected and provided for, that the same required expenditure of very considerable time upon the part of persons acting for the partnership.

The documents were not offered to prove the truth of their contents, but were offered for the purpose of showing the time and effort expended and, further, to show the intention of the partnership as indicated by the overt acts of negotiations which resulted in the documentation. In particular instances, as will hereinafter be noted, documentation was excluded which had been fully executed and which was absolutely essential to explain the background and underlying reason for activities testified to and without which documentation the activities in and of themselves did not make sense.

Some of the instances of the exclusion of such documentation are as follows:

1. Exhibit 5, for identification (Appendix D) was repeatedly offered (R. 46, 210-212, 213-214). This was an Agreement between one, Coslow and United Artists Corporation for the production and distribution of "Copacabana" throughout the world. The due execution of the document was proved and it was likewise established that the picture "Copacabana" was pro-

duced and distributed pursuant to this agreement (R. 210-212). Since this was a fully and duly executed agreement pursuant to which the partners acted and the partners lost $90,000.00, it was competent and relevant to show the following:

That Coslow contributed distribution facilities; that he had to be the principal stockholder of the corporation producing the same; and that he had to be the producer thereof. Therefore it became necessary for the partnership to provide the funds to activate Beacon Pictures Corporation, permitting Coslow to be the stockholder. The reason why the partnership became the beneficial owner of a substantial part of the picture "Copacabana" instead of co-producers and co-owners thereof is only explained by reference to this agreement. The agreement tends to establish the reason for activating the corporation for the production of films, and perhaps why corporations were organized. The agreement was necessary to supply the missing link in the testimony, and which was not otherwise admissible, to establish why appellants activated Beacon Pictures Corp., and to establish why appellants could not become the co-producers of the films.

A principal portion of the trial was devoted to inquiries as to why the partnership expended funds in activating Beacon Pictures Corporation with no other competent evidence to explain the reason for this expenditure except the terms of the said Agreement. The Court gave as reason for

its failure to admit the document in evidence that the names of H. Koch & Sons did not appear in the instrument (Exhibit 5 for identification) and the Court refused to hear from counsel thereon (R. 214). Appellants were third party beneficiaries to the Agreement, and in accordance with its terms, appellants (who were not named therein) would have received their income and benefits directly from United Artists (App. D).

Plaintiffs' theory of necessary proofs was as follows:

(i) The formal agreement of the parties entered into years prior to the loss in question and pursuant to which the partnership agreed to engage in the business of financing motion picture ventures as a business activity, and (ii) The numerous activities in regard to motion picture financing at the time in question; (iii) The substantial time expended by the personal activity of partners and the attorneys, agents and employees of the partnership.

When plaintiff sought to inquire as to the amount of time expended by directly inquiring into the fact in question, the Court erroneously sustained objection (R. 60):

"Q. (By Mr. Fink). Can you tell us approximately how many different deals were looked into by you over the period of the last six months of 1946?

Mr. Gillard. I object to that as vague and speculative, and calling for the opinion and conclusion of the witness.

The Court. I think in view of the objection he would have to give the individual contacts."

When plaintiffs made direct inquiry of a disinterested witness, who was present at almost every transaction, as to the amount of time spent by Mr. Koch in these activities to "your own personal knowledge" in the year 1947, this testimony was likewise excluded.

See (R. 245-246) "Q. (By Mr. Fink). So far as your own personal knowledge is concerned, with regard to the year 1947, approximately what part of Mr. Koch's time did he spend in connection with motion picture activities?

Mr. Gillard. I object to that as calling for the opinion and conclusion of the witness.

The Court. Sustained."

The manner of the trial judge suggested very strongly that extreme censorship would follow repeated attempts along this line. It was error to eliminate testimony upon time spent and number of transactions entered into during the periods in question. However, it was virtually impossible to overcome these errors when, in keeping with the Court's rulings, appellants sought to introduce the details relating to each separate transaction. Appellants offered documents prepared at the time and during the course of numerous transactions entered into in the period in question. Thus, appellants offered Exhibit 19 for

identification (Appendix E). This is an unsigned document which was negotiated by appellants during the year 1947 for the financing and production of a series of films. The record established that the parties to the agreement are well-known creative persons in the film industry. The offer of this document was specifically made for the purpose *only of showing the activities* of the partnership in financing motion pictures during the year 1947 and as part of the consistent and extended time and efforts expended, all to the point that the transaction in which the loss occurred was not an isolated instance of activity (R. 79-81). The document was prepared at the direction of the partnership; by counsel employed by the partnership; was reviewed by the partnership; was acceptable to the partnership; was part of the effort put forth in connection with the business of participating in the promotion and financing of motion pictures in the year 1947; was prepared in the course of that business; and all the shares of stock of the corporation involved (Ambassador Pictures) were acquired by the partnership (R. 78-85).

The offer of Exhibit 19 for identification was renewed (R. 84-85). The Court still refused to admit this and similar documents on the grounds that the same were not executed. The record was quite clear that documentation of this type was not offered to establish that a "package" was concluded, but was offered purely for the purpose of showing the time and effort expended. If this document and other sim-

ilar documents offered had been admitted by the Court, the jury could have reasonably drawn the inference, from the very nature of the transactions disclosed, that the preparation thereof was attended by negotiations, time, effort, attorneys' charges and other expenses. Certainly in determining whether or not a company is engaged in the business of financing, one should not be limited to consideration of activities only when funds are actually advanced.

The same situation applied with regard to Exhibit 21 for identification (Appendix F). The proposed employment contract between Ambassador Productions (the wholly owned corporation) and a director named Al Green (R. 84-85) which the Court excluded on the same ground, to wit, that it was not executed.

The same error occurred in connection with the offer of Exhibit 26 for identification (Appendix G), a contract negotiated in the exact period in question between Monogram Pictures Corporation and Ambassador Productions, Inc. (appellants' wholly owned corporation) for the financing, production and distribution of a series of films, together with a letter dated September 25, 1947, from Monogram Pictures Corporation. Although it was stipulated that the documents were prepared and received, the Court refused to admit the documents on the grounds that the same were not executed, and upon this premise the Court held that there was no foundation laid for their introduction (R. 99-100).

This document would have established that not only was someone doing something for the partnership in this field of endeavor, but reasonable minds could have drawn the inference that a great and extended effort was involved in arriving at the point of this documentation and that there were expenses and negotiations in connection therewith. It was clear that the document was offered for the purpose of proving activity and not to prove that a transaction was concluded. We submit that many transactions, which were intended to be concluded, could not be concluded due to the loss of the $90,000.00 of funds in question. This loss was not realized at the time of these negotiations.

The Court likewise refused admission of Exhibit 29 for Identification (Appendix H), a letter of November 19, 1947, which established that negotiations and activities were continuing between the partnership and Monogram on that date (the prior documentation and correspondence, Exhibit 26 for Identification, having been dated September 25, 1947). Although it was stipulated that the letter was received, the Court nevertheless refused to admit the same. The grounds for its ruling are not clear unless it was because one of the attorneys to whom the letter was addressed was a director of the corporation which was wholly owned by the partnership; however, the record clearly established that the attorneys were acting for the partnership at all times and organized the corporation and

negotiated and prepared documentation only for and on behalf of the partnership (R. 78, 88-89, 109, 124). The Court's ruling, basically, was consistent with its opinion that such documentation should be excluded (R. 107-108).

The Court having ruled that only concluded transactions for financing need be considered, appellants attempted to offer evidence of actual advancement of funds and, among other things, established that a project was negotiated in 1947 for the financing of a series of army training films to be made by Apex Film Corporation. The first advancement of funds, however, occurred on January 26, 1948 (immediately following the close of the year in question). Appellants offered the cancelled check and details of the advances from the partnership, whereupon the Court ruled that details would not be admitted (R. 128-130). Objection was apparently made on the ground that the funds were expended after the close of the year 1947. The Court had ruled that only details of transactions were admissible for the year 1947 (R. 60, 245-246), and for the following month only general information. This evidence would tend to prove that the parties were engaged in the business at the end of the year 1947.

The Court likewise refused to admit Exhibit 24 for Identification which was offered to show extended negotiation over many months for the purchase of the story property "Hill of the Hawk" for the wholly owned partnership corporation, Ambassador Productions (R. 92-93). Funds were advanced and expended

in this project during the year 1947 and remained outstanding at the close of that year. The erroneous exclusion prevented proof of the commencement of negotiations and the time expended and intervening between initiation and closing of the "package".

Because "Hill of the Hawk" and other assets continued to be held by appellants for some years after expiration of the year 1947, and because defendants proved that "Hill of the Hawk" and Ambassador Productions was sold out some years later, appellants sought to offer testimony with regard to when the partnership discontinued its motion picture financing activities. This evidence was excluded on the erroneous ground that the questions called for a conclusion (R. 181, 182).

F. ERRONEOUS FINDINGS.

(1) Finding No. 2 (R. 8) finds "Said Articles of Co-Partnership were amended by written agreement dated October 23, 1944" pursuant to which the partners agreed to also engage in the business of financing motion picture productions. "The said partnership agreement, as amended, has remained in full force and effect at all times herein mentioned." The Court followed this finding with its erroneous and confusing finding No. 5 which determines that "For the years 1945, 1946 and 1947 . . . — were partners in the business of manufacturing and selling luggage . . . " Thus, finding No. 2 and finding No. 5 are clearly in conflict.

Finding No. 5 is contrary to the basic and formal partnership agreement and the acts of the partners. The findings fail to find that the partnership had any activity in the business of financing motion pictures. If the Court had found that the number of activities was insufficient to constitute the doing of business, we would certainly differ; however, here in the face of overwhelming evidence the Court, in effect and tacitly, finds none. The record does not even leave open the possibility for consideration of the judgment in the light of appropriate findings.

(2) The complaint alleges and the answer admits the loss of the total sum of $90,000.00 (supra). Finding No. 6 (R. 8-9) finds that only $75,000.00 was lost which is contrary to the pleadings and issues as framed and upon which the cause was tried. The finding designates that a loan transaction occurred, whereas, in essence, the transaction was one by which the partnership acquired the largest block of ownership in the film of all participants by reason of its advancement of the $90,000.00 which was lost and by reason of its activation of the corporation in whose name the picture was made.

(3) Findings Nos. 8 and 9 (R. 9-10) recite that the Collector of Internal Revenue "advised each of the plaintiffs that the claims for the year 1945 were denied, and that the claims for the year 1947 would not be allowed on the theory advanced to support the claims, but would be allowed as a non-business bad debt and not otherwise". This finding assumes that

plaintiffs are bound by the findings of the Collector of Internal Revenue and that this alleged presumption of correctness continues at the close of the lengthy trial to outweigh all evidence. At the close of the case, and after voluminous testimony, this "presumption of correctness" erroneously controls the determination of the cause. Since the determination of the Commissioner can no longer be considered as evidence in the cause, Findings 8 and 9 are not supported by the evidence.

(4) Finding No. 10 is in error. The Court here finds "Maurice P. Koch was not engaged in the business of financing motion picture ventures during the calendar year 1947". This fact was not in issue. The record is clear that all of his activities were in behalf of the partnership and never in his own behalf. The partnership agreement so provided (Exhibit 1, Appendix A; Exhibit 2, Appendix B). All of the funds, including the entire $90,000.00 loss, was disbursed by the partnership upon the partnership bank account. Maurice P. Koch acted only for the partnership and not for himself and there is no evidence to the contrary (R. 43, 56, 57, 72, 76, 96, 97, 101, 112, 122-125, 191). The partnership agreement provided (Exhibit 2, Appendix B) that if one of the partners contributed more funds to the partnership than the others, such partner obtains a larger share of the profits and losses. Maurice P. Koch contributed an extra $15,000.00 to the partnership funds and therefore was entitled to a larger share of the profits and losses. The

Court, however, interpreted the agreement erroneously and determined that Maurice P. Koch could not have the advantage of the additional loss unless he was personally (as distinguished from the partnership) engaged in the business of financing pictures, aside from his participation as a partner. There was absolutely no evidence in the record to show that he had ever engaged in his own behalf; and based upon its erroneous interpretation, the Court granted a nonsuit to the extent of his claim for the additional loss sustained.

(5) Finding No. 11 (R. 10) is in error in that the finding is predicated upon the assumption that the loss had to be related to a particular form of activity with third persons, (i.e. debt, joint venture, etc.). The only question at issue was whether or not the loss was related to a trade or business carried on by the plaintiffs. This must be determined by the plaintiffs' "trade or business", and is not at all determined by the particular form of the dealings with others. The plaintiffs already had a partnership pursuant to written agreement providing that they would engage in the business of financing motion picture ventures, and the pleadings admitted the loss of $90,000.00 incurred in financing a motion picture.

(6) Finding No. 12 (R. 10) recites:

> "12. The parties stipulated that the plaintiffs' rights to recover the alleged overpayments of taxes would require the jury to answer 'yes' to the following interrogatory submitted to them:

'During the year 1947, was H. Koch & Sons regularly engaged in the business of financing motion picture ventures?'"

Finding 12 assumes that stipulations were entered into which were not entered into, and this finding is contrary to the express record. The record on the subject (R. 293) discloses the following:

"The Court. May it be stipulated by both parties that in view of the Court's rulings up to this time, that the only issue to be presented to the jury is the special interrogatory which reads as follows:

'During the year 1947 was H. Koch & Sons regularly engaged in the business of financing motion picture ventures? Yes—no.'

May that be stipulated?

Mr. Fink. So stipulated.

Mr. Gillard. So stipulated.

The Court. May it be further stipulated that thereafter, after such special interrogatory has been submitted to the jury, that all motions, issues and facts involved in the case are to be determined by the Court unless the parties stipulate as to such motions, issues or facts?

Mr. Fink. So stipulated.

Mr. Gillard. So stipulated."

It was clear that only this one interrogatory could be agreed upon. All other matters were left for determination by the Court. The Court cannot avoid the necessity of finding fully and correctly upon the material issues involved. Thus, peculiarly, we have

no finding whatsoever that the partnership had any motion picture financing activities or business or the extent of the relationship to the business.

G. ERRONEOUS CONCLUSIONS OF LAW.

The conclusions of law are erroneous in that they are based upon findings which are not supported by the evidence. They are apparently based upon stipulations which are not existent and contrary to the record. The conclusions in the first instance are based upon the presumption of correctness of the Commissioner of Internal Revenue's determination which is non-existent (see supra) after evidence was introduced. The conclusions are in error because the pleadings admit the loss of $90,000. The conclusions of law are erroneous because they assume (Conclusion No. 4, R. 11, as well as other conclusions) that Maurice P. Koch individually (as distinguished from the partnership) made a loan. The entire $90,000 was advanced by the partnership from partnership funds. All activities were conducted under the partnership agreement, by the partnership, and the loss was incurred by the partnership, as clearly demonstrated by the entire record, and not by Maurice P. Koch individually. This erroneous interpretation of the agreement by the Court, erroneous findings, erroneous partial dismissal, and now erroneous conclusions of law, have nullified the entire proceeding and prejudiced the determination of this cause.

H. THE JUDGMENT IS NOT SUPPORTED BY THE EVIDENCE.

(1) The judgment is based upon the determination by the jury of an answer to a special interrogatory. This answer to the interrogatory could only be based upon the erroneous instruction of the Court (R. 301, 302) that "There is a presumption that the determination by the Commissioner of Internal Revenue that the plaintiffs were not engaged in the trade or business of financing motion picture ventures is correct" and the further instruction that this presumption could only be overcome by a preponderance of the evidence. The findings of the Court are likewise predicated on this presumption (Finding No. 8, page 9) and the entire findings are based thereon. The conclusions of law likewise result from this alleged presumption and therefore are likewise erroneous.

It follows that the judgment is erroneous and in contravention of the express decisions of this Honorable Court (see 9th Circuit decisions, supra: *J. M. Perry v. Commissioner,* (120 F.2d 123 (C.C.A. 9)); *San Joaquin Brick Co. v. Commissioner of Internal Revenue,* 130 F.2d 220, at page 225 (C.C.A. 9); *Hemphill Schools v. Commissioner of Internal Revenue,* 137 F.2d 961, at pp. 963, 964 (C.C.A. 9).)

In said last case the Court stated: "Whether that determination (referring to determination by the Commissioner of Internal Revenue) was correct or incorrect was the principal, if not the sole, issue in the case." Peculiarly, this language applies with equal force to the instant case. It was practically the sole

issue relating to all facets of the instant cause and in all such facets the trial Court's rulings and determinations were erroneous with the result that the judgment is likewise erroneous.

No witnesses were called by the defense; no evidence was elicited by the defendant; all the evidence conclusively establishes that (a) plaintiffs had entered into a partnership agreement for the purpose of engaging in the business of financing motion picture ventures; (b) that they did so engage continuously during and throughout the entire period in question; (c) there is no evidence to the contrary in the absence of the alleged "presumption"; (d) the jury determined that the Commissioner of Internal Revenue knew more than they did about tax cases and found in accordance with the Commissioner's findings and not in accordance with the facts of the case; and (e) the Court took the answer to the interrogatory as the answer to the case, and assumed stipulations which did not exist for the purpose of resolving the entire matter based upon the erroneous determination by the jury.

The judgment is not sustained by the facts or the law.

I. PREJUDICIAL MISCONDUCT OF COUNSEL.

Counsel for the Government told the jury that plaintiff was now engaged in a second trial of this matter; that plaintiff "already had one crack at this

case," (R. 344), and despite objections by plaintiff's counsel, Government counsel insisted upon telling the jury that the Commissioner of Internal Revenue had made a "determination" against the plaintiff. (R. 344.) These statements were fortified by further remarks of counsel that the Commissioner of Internal Revenue, who was sworn to uphold and preserve the people's rights, had determined the matter once and that the Commissioner knew more about tax determinations than the jury. (R. 371.)

Furthermore, in effect, Government counsel told the jury that plaintiff was attempting by surreptitious means to evade the "determination" of the Commissioner of Internal Revenue by laying down a "smoke-screen" (R. 346) and by attempting to "snow" the jury. (R. 366.)

Thus we have the attorney for the people (and therefore the representative of the jury) deliberately telling the jury to disregard all the evidence relating to transactions conducted by the plaintiff continuously and regularly and at great effort and cost, when said counsel knew that his statements were diametrically opposed to all the law on the subject and that in fact the jury was empaneled only to consider the extent of such activities, and certainly under all known law on the subject the jury should not have disregarded such activities.

J. CONCLUSION.

It is respectfully submitted that the judgment should be reversed and remanded to the trial Court for the computation of the amounts due plaintiffs; or, in the alternative, that judgment be reversed and the cause be remanded for trial.

Dated, February 7, 1958.

Respectfully submitted,
MAX FINK,
LEON SCHILLER,
Attorneys for Appellants.

(Appendices Follow.)

Appendices.

EXHIBITS WHICH ARE PART OF RECORD

Description	Page References to the Record			
	Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibi Rejecte
H. Koch & Sons Partnership Agreement dated December 31, 1941	R 35	R 35	R 35	
Amendment to Agreement of December 31, 1941	R 35	R 35	R 36	
Producers Syndicate Agreement	R 36	R 36	R 37	
Agreement between Copacabana, Inc. and Beacon Pictures, Inc. dated April 8, 1946	R 41	R 41	R 42	
Agreement between Coslow and United Artists Corporation	R 45	R 46 R 211 R 213 R 214		R 46 R 212 R 213 R 214
Photostat of check of April 25, 1946, drawn by H. Koch & Sons to order of David Sebastian in amount of $15,000.00	R 47	R 47	R 47	
Letter of May 17, 1946, from David Hersch to H. Koch & Sons acknowledging receipt of funds	R 51	R 51	R 51	
Photostat of check drawn by H. Koch & Sons to order of David Sebastian in amount of $2,500.00	R 53	R 53	R 53	
Letter dated July 31, 1946, from H. Koch & Sons to David Hersch	R 54	R 54	R 54	
Telegram addressed to Maurice P. Koch from David Hersch	R 54-5	R 55	R 55	
Photostat of check drawn by H. Koch & Sons to order of David A. Sebastian for $50,000.00	R 55	R 55	R 55	

Exhibits Which Are Part of Record (Continued)

ber / bit	Description	Page References to the Record: Exhibit Identified	Exhibit Offered	Exhibit Received	Ex Re
	Letter from Bank of America to David Hersch dated September 25, 1946	R 64-65	R 65	R 65	
	Promissory note of August 31, 1946, executed by Beacon Pictures Corporation and payable to order of Maurice P. Koch for amount of $50,000.00	R 68	R 68	R 68	
	Check drawn by H. Koch & Sons to order of David Sebastian for $30,000.00	R 68-69	R 69	R 69	
	Promissory note of October 17, 1946, executed by Beacon Pictures Corporation to order of Maurice P. Koch for amount of $30,000.00	R 69	R 69	R 69	
	Letter of August 12, 1946 signed by David Hersch and David Sebastian, addressed to Murray P. Koch	R 69	R 70	R 70	
	Agreement between Murray P. Koch in behalf of H. Koch & Sons and Beacon Pictures Corporation, dated August 31, 1946	R 72	R 73	R 73	
	Supplemental Agreement between Murray P. Koch in behalf of H. Koch & Sons and Beacon Pictures Corporation, dated October 17, 1946	R 73	R 73	R 73	
	Check drawn by H. Koch & Sons to order of Beacon Pictures Corporation, dated November 22, 1946, for $20,000.00	R 73-74	R 74	R 74	
	Unsigned document establishing venture for financing and production of a series of films, between Maurice P. Koch, in behalf of H. Koch & Sons, and other persons in the film industry	R 78, 80, 82	R 79, 80, 81, 82 84-85		R 8 8

Exhibits Which Are Part of Record (Continued)

Description	Page References to the Record			
	Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
Permit of Department of Investment, State of California, authorizing Ambassador Productions, Inc. to issue its shares of stock	R 83	R 83	R 83	
Unsigned Agreement between Ambassador Productions, Inc. and Alfred E. Green, dated April 28, 1947, providing for employment of Green	R 84, 85	R 84, 85		R 85
Document entitled "Mortgage," dated February 7, 1947, executed by Beacon Pictures Corporation in favor of Murray P. Koch	R 86, 87	R 87	R 87	
Articles of Incorporation of Ambassador Productions, Inc.	R 88	R 88	R 88	
Letter from Annie Laurie Williams to Max Fink, dated October 17, 1946, regarding Hill of the Hawk	R 92, 93	R 92, 93		R 93
Articles of Incorporation of Producers Finance Corporation	R 95, 96	R 95, 96	R 96	
Unsigned Agreement negotiated in 1947 between Monogram Pictures Corporation and Ambassador Productions, Inc. for financing, production and distribution of films, together with letter of transmittal dated September 25, 1947, from Monogram Pictures Corporation	R 99, 100	R 99, 100		R 99, 1
Letter of Harry Fox to Max Fink, dated July 3, 1947 relative to Fred Fisher story	R 104, 105	R 104, 105	R 105	
Letter of Harry Fox to Max Fink, dated September 29, 1947, relative to Fred Fisher story	R 105, 106	R 105, 106	R 106	
Letter of November 19, 1947, from Monogram Pictures Corporation to Max Fink	R 107, 108	R 107, 108		R 108

Exhibits Which Are Part of Record (Continued)

ber bit	Description	Page References to the Record Exhibit Identified	Exhibit Offered	Exhibit Received	Ex Re
	Check for $7,000.00 dated December 3, 1947, payable to Ambassador Pictures Corporation and issued by Maurice P. Koch	R 114	R 114	R 114	
	Agreement between Scott O'Dell and Ambassador Pictures Corporation dated December 12, 1947	R 115	R 115	R 116	
	Check for $5,000.00 dated June 8, 1948, to Max Fink from Maurice Koch and check for $5,000.00 dated June 9, 1948, drawn on the trust account of Fink, Rolston, Levinthal & Kent, to Annie Laurie Williams, Inc.	R 116, 117, 118	R 117, 118	R 118	
	Two checks of May 10, 1948, one for $4,500.00 and one for $500.00, both drawn on trust account of Fink, Rolston, Levinthal & Kent, to Annie Laurie Williams, Inc. A check for $8,000.00, dated July 9, 1948, drawn on same account to same payee	R 119, 120	R 119, 120	R 119, 120	
	Letter of July 8, 1948 from H. Koch & Sons to Max Fink and letter of July 9, 1948, in reply	R 122	R 122	R 122	
	Amended 1947 Partnership income tax return	R 186	R 186	R 187	
	Stock Permit of Producers Finance Corporation	R 195	R 195	R 195	

Exhibits Which Are Part of Record (Continued)

Description	Page References to the Record			
	Exhibit Identified	Exhibit Offered	Exhibit Received	Exhibit Rejected
nt's Exhibits:				
Tax protest dated October 10, 1951	R 137			
H. Koch & Sons partnership return for 1946	R 141	R 141	R 141	
H. Koch & Sons partnership return for 1947	R 141	R 141	R 141	
Maurice P. Koch return for 1946	R 141	R 141	R 141	
Maurice P. Koch return for 1947	R 141	R 141	R 141	
Articles of Incorporation of Beacon Pictures Corporation	R 150, 151	R 150, 151	R 151	
Default Judgment against Beacon Pictures Corporation in favor of Maurice P. Koch	R 156	R 156	R 158	
Letter dated January 29, 1948, to Jack Chertok from Producers Finance Corporation	R 173	R 173	R 173, 174	
Check of Producers Finance Corporation to Max Fink dated July 8, 1948, for $8,000.00	R 176	R 176	R 176	
Partnership Agreement between David Hersch and David Sebastian	R 248	R 248	R 248	
Certified copy of referee's claim register in bankruptcy proceedings of Beacon Pictures Corporation	R 260	R 260	R 260	

Appendix A

PLAINTIFFS' NO. 1—IN EVIDENCE

THIS AGREEMENT entered into this 31st day of December, 1941, by and between REBECCA KOCH, MAURICE P. KOCH, HAROLD M. KOCH, and WILLIAM L. KOCH, all of the City and County of San Francisco, State of California,

WITNESSETH:

WHEREAS, all of the parties hereto are brothers and sisters, and all are the recipients of a gift from their parents HERMAN KOCH and CELIA KOCH, the subject of which gift is that certain business known as HERMAN KOCH & SONS; and

* * * * * * *

Each and all of said parties agree, in consideration of the mutual promises and agreements from each of said parties, to the others, that his interest in said business shall continue only for such a period of time as he or she shall remain in active participation of said business, * * * it being further understood that in the event any of said partners disassociates himself from said business voluntarily that his interest in said business immediately ceases and determines, and there shall be paid to said party for his interest in said business, regardless of the value of his interest therein, the sum of $1000.00. It being further understood that in the event one of the parties hereto leaves said business, that the interests of said parties remaining shall be equal; it is further understood that the voluntary remaining away from said business for a

period of sixty days or more shall be deemed a prima facie withdrawal and disassociation from said business by the party so remaining away, and that at the expiration of the said sixty days his interest in said partnership business is subject to divestment.

* * * * * * *

As compensation for services rendered by the parties in connection with said firm business, the salaries and drawings of said parties shall be as follows:

To REBECCA KOCH	$70.00 per week;
To HAROLD M. KOCH	$70.00 per week;
To WILLIAM L. KOCH	$70.00 per week;
To MAURICE P. KOCH	$100.00 per week

as salary, and $100.00 per month as and for city and local sales expense, which said sum of $100.00 per month is payable on the 1st day of each month in advance, * * * In addition to the foregoing, the said Maurice P. Koch shall receive from the firm the sum of $2100.00 annually as and for traveling and sales expense, which said sum is payable as needed by the said Maurice P. Koch while on the road traveling for said firm.

* * * * * * *

It is further understood and agreed that all of said parties hereto shall devote all of their time to the interests of the said business and for the benefit thereof.

* * * * * * *

In the event any dispute of any kind, nature or character, specifically including any dispute which

may arise as to any of the parties hereto losing his interest in said business by violation of the terms of this agreement, any and all such disputes shall forthwith, by any of the parties hereto or by any party interested in this or any other agreement made this date, or as heirs of any of the parties hereto shall be referred to MORRIS M. GRUPP for arbitration and decision.

* * * * * * *

Appendix B

PLAINTIFFS' NO. 2—IN EVIDENCE

AMENDMENT TO AGREEMENT OF DECEMBER 31, 1941

THIS AGREEMENT entered into this 23rd day of October, 1944, by and between REBECCA KOCH, MAURICE P. KOCH, HAROLD M. KOCH AND WILLIAM L. KOCH, copartners, doing business under the fictitious firm name and style of H. KOCH & SONS, all of the City and County of San Francisco, State of California

WITNESSETH:

WHEREAS, it is the desire of the partners above named, and each of them, to enlarge the scope of their partnership business and activities and to amend the existing Articles of Partnership accordingly.

NOW, THEREFORE, in consideration of their mutual covenants and agreements the parties hereto, each for himself, agrees that the existing Articles of Copartnership, dated December 31, 1941, be amended to include therein the following:

1. The said partnership business will, in addition to engaging in those activities referred to in the existing partnership agreement, engage in the business of financing motion picture productions * * *.

2. The assets of the partnership are to be available in the operation of this new business activity. It being understood further that nothing herein to the contrary withstanding, if any individual partner

or partners desires to advance any sums toward the abovementioned business activity over and above the sum advanced by this partnership that the profits realized on such sums advanced by the individual partners or the partnership shall be divided as follows:

(a) Moneys advanced by individual partners over and above the sum advanced by the partnership shall be first refunded to such partner or partners individually;

(b) The profits realized from that portion of the money advanced by the partnership or by the individual partners in equal sums each to the other shall upon realization of such profits become partnership assets;

(c) The profit on such sum or sums advanced by any one or more partners over and above that advanced by the other partner or partners shall belong to the individual partner or partners so advancing any excess;

(d) The losses on such sums advanced by the partnership or the sums advanced by individual partners to the extent that such sums so advanced by the individual partners are equal to that advanced by all the other partners shall be borne by the partnership and by the partners thereof equally. The losses on any sums advanced by individual partners over and above that advanced by the other partner or partners equally shall be borne wholly by said partner or partners so advancing such excess.

3. Maurice P. Koch is hereby appointed manager of that portion of the partnership business referred to in this Amendment and any expenses he may incur by reason of the management of this branch of the said business shall be borne by the said partnership in addition to any expenses heretofore provided in the original partnership agreement.

4. As such General Manager the said Maurice P. Koch is hereby authorized to deal in his own name with any person, firm or corporation with relation to the business herein referred to. It being understood and agreed that in so dealing in his own name the said Maurice P. Koch is acting as the agent of the said partnership and the agent of the individual partners thereto and that any funds received by him, any stocks or bonds or notes or other evidences of indebtedness, any contracts or licenses he may secure in his own name as a result of the proceeds of this partnership or the individual partners shall to the extent of the advance of moneys by this partnership or the individual partners be and remain the property of the partnership or the individual partners, notwithstanding that the same may on the written evidences of indebtedness or contracts stand in the name of Maurice P. Koch.

5. It being understood, however, in this connection that the said Maurice P. Koch will not enter into any transaction on behalf of said partnership without the consent of a majority of the partners and it being further understood that the said Maurice P. Koch is

to receive no increase in compensation for time devoted to this branch of the business.

EXECUTED by the parties hereto the day and year first above written.

Rebecca Koch
Maurice P. Koch
Harold M. Koch
William L. Koch

Appendix C

PLAINTIFFS' NO. 3—IN EVIDENCE

THIS AGREEMENT entered into this 23rd day of October, 1944, by and between DAVE SEBASTIAN of the City of Beverly Hills, County of Los Angeles, State of California, and AL KANTROW, MAURICE P. KOCH, REBECCA KOCH, HAROLD M. KOCH, WILLIAM L. KOCH, JACK SILVERMAN, AL BACH, MAX GOTTLIEB, SAUL BAROFF, and MANUEL ROBINSON, all of the City and County of San Francisco, State of California, and HERMAN SALKIN of Redwood City, California, ROY HALLER, of Oakland, County of Alameda, State of California, MOE GOTTLIEB, of Ventura, California, MACK GILSON, of Oxnard, California, and HOBART W. RUDE, LOUIS LUBIN and SAM BRAUNSTEIN all of the City of Los Angeles, County of Los Angeles, State of California.

* * * * * * *

Said partnership shall be known as "PRODUCERS SYNDICATE".

* * * * * * *

3. The business of the partnership shall be to purchase an interest in the Sid Broad Production, "untitled," of a minimum of twenty per cent (20%) of the producer's share or cut in said production, and said money to be invested in this partnership is to be used specifically under the terms and conditions hereinafter set forth.

The further business of this partnership shall at the option of the partners, be the production of other motion pictures subsequent to the completion of the first picture by the Sid Broad Productions.

* * * * * * *

11. It is understood and agreed that all of the monies of this partnership shall be placed under the exclusive control of Morris M. Grupp, who shall open a bank account under the name of this partnership, and shall have the right to draw upon said funds under the following conditions:

* * * * * * *

B. The full sum to wit: $50,000.00 shall be delivered to Dave Sebastian in full by the said Morris M. Grupp under the following conditions:

(1) When the said Morris M. Grupp is satisfied that the said Dave Sebastian has obtained, or will, simultaneously, upon the delivery of said money to the Sid Broad Productions, obtain the following contracts or assurances in writing:

(a) That full provisions have been made by the producer, to wit: Sid Broad, or by his agents, for the obtaining of any balance of monies necessary to produce the picture intended to be produced, over and above the $50,000.00 to be delivered to the said Dave Sebastian. Said balance of such monies to be obtained by said producer either by deferments, loans or otherwise.

* * * * * * *

Appendix D

PLAINTIFFS' NO. 5—FOR IDENTIFICATION

AGREEMENT

Dated April 16th, 1946

By and Between

Producer SAM COSLOW

with a place of business and address for all purposes hereunder at Hollywood, California

and

United

United Artists Corporation

a Delaware corporation, with its place of business and address for all purposes hereunder at 729 Seventh Avenue, New York City, New York.

* * * * * * *

THE PRODUCER

The description and provisions concerning the Producer are set forth in Schedule "B" attached hereto.

SPECIFICATIONS AND DESCRIPTION OF MOTION PICTURES TO BE DELIVERED

The description of the motion pictures to be delivered hereunder, the conditions concerning such motion pictures, the type and quality of the motion pictures, the number of motion pictures and time of delivery of those motion pictures are set forth in Schedule "B".

GRANT

The Producer grants to United and United accepts from the Producer the sole and exclusive right, license and privilege to exploit, distribute, exhibit and market, and cause to be exploited, distributed, exhibited and marketed the motion pictures specified herein in the entire world, including specifically the territories set forth in Schedule C hereto attached on both standard and sub-standard widths and both theatrical and non-theatrical, together with the right to re-issue same for a period of seven (7) years from the general release date of each said motion picture in the United States.

* * * * * * *

1) THE PRODUCER represents and warrants that it owns the sole and exclusive license to produce a motion picture entitled "COPACABANA" which he will produce, and that Carmen Miranda, Dennis O'Keefe and Andy Russell will be starred in said motion picture, and when completed will deliver said picture to United for distribution which United agrees to accept for distribution.

2) The PRODUCER represents and warrants that he will have the controlling interest in the corporation which produces said picture.

* * * * * * *

PRODUCER'S RIGHT TO ASSIGN

a) Nothing herein contained shall be deemed to limit the right of the Producer to assign all of its right, title and interest in and to any motion picture, including the copyright thereto, the negative and positive copies thereof and that portion of the gross receipts payable to the Producer hereunder, to any company or corporation, provided, however, such company or corporation shall, at the time of such assignment be wholly owned or wholly controlled by Producer and provided, further, that should such company at any time cease to be wholly owned or wholly controlled by Producer, then and in that event the rights so assigned to it shall immediately revert to and revest in the Producer, and that such assignment shall be subject to such reversion and to the condition that the assignee company or corporation shall have no right to assign all or any right so assigned to it other than to the Producer. It is further agreed that any such assignment shall be subject to the rights of United hereunder and under any modifications thereof or amendments thereto, and shall not operate to relieve the Producer of any of its obligations hereunder.

b) Nothing herein contained shall be deemed to limit the right of the Producer to assign all of its right, title and interest in and to any motion picture, including the copyright thereto, the negative and positive copies thereof and that portion of the gross receipts payable to the Producer hereunder, to any bank or other person, firm or corporation, as collateral

security for a loan; provided, however, that any such assignment shall be made subject to the rights of United under this agreement and any modifications thereof or amendments thereto, and that it shall not operate to relieve the Producer of any of its obligations hereunder.

c) Nothing herein contained shall be deemed to prevent or prohibit the Producer from assigning to any person, firm or corporation all or any part of the Producer's interest in the receipts or proceeds of any completed motion picture. Any such assignment shall, of course, be made subject to the rights of the United under this agreement and any modifications thereof or amendments thereto, shall not operate to relieve the Producer of any of his obligations hereunder.

Appendix E

PLAINTIFFS' NO. 19—FOR IDENTIFICATION

THIS AGREEMENT, made and entered into this ..... day of ....., 1947, by and between MAURICE P. KOCH, hereinafter referred to as "KOCH", ALFRED E. GREEN, hereinafter referred to as "GREEN", DAVID A. SEBASTIAN, hereinafter referred to as "SEBASTIAN", and SIDNEY ROSS, hereinafter referred to as "ROSS."

This Agreement is made in contemplation of the following facts:

1) GREEN, SEBASTIAN and ROSS are officers and three of the directors of AMBASSADOR PRODUCTIONS, INC., a California corporation, hereinafter referred to as "CORPORATION."

2) That the sole stockholder of the said CORPORATION is MAURICE P. KOCH, who owns Five Hundred (500) shares of the common stock of said CORPORATION, having paid the sum of FIFTY ($50.00) DOLLARS per share for said stock.

3) That the parties hereto are desirous of entering into an arrangement by which GREEN, SEBASTIAN and ROSS shall have an option to purchase a portion of the stock owned by KOCH.

NOW, THEREFORE, in consideration of the premises and the covenants hereinafter set forth, it is agreed as follows:

* * * * * * *

Appendix F

PLAINTIFFS' NO. 21—FOR IDENTIFICATION

Los Angeles, California
April 28, 1947

Mr. Alfred E. Green
Los Angeles, California

Dear Sir:

This will confirm your employment agreement with us as follows:

1. We hereby employ you to render your exclusive services for us as the producer and director for a period of three (3) years for and in connection with the preparation, production, direction and completion of not more than six (6) feature length motion picture photoplays in said period and in such other capacities relating to the preparation, production and completion of the photoplays as we may from time to time designate.

* * * * * * *

Your signature affixed at the place indicated will constitute this a binding agreement between us.

Very truly yours,
AMBASSADOR PRODUCTIONS, INC.
By .....

ACCEPTED AND AGREED TO:

.....

Alfred E. Green

Appendix G

PLAINTIFFS' NO. 26—FOR IDENTIFICATION

September 25, 1947

Mr. Max Fink
6253 Hollywood Blvd.
Los Angeles, 28, California

Dear Max:

I am pleased to enclose for your inspection a draft of the proposed contract for two pictures to be supervised by Jack Chertok. I call your attention to the fact that the submission of the enclosure to you at this time is unofficial for the reason that this draft has not as yet been approved by Monogram.

After you have had a chance to go over this contract, please contact me so that we may discuss any questions which you may have concerning it.

Please excuse the delay in forwarding this instrument to you.

Kindest regards.

Sincerely,
Barney
BARNETT SHAPIRO - RESIDENT ATTORNEY

BS:jt
Enclosure

AMBASSADOR PICTURES
Los Angeles, California

Gentlemen:

The following is our agreement:

SECTION I

PRODUCTION

1. You agree to produce and deliver to us for distribution by us two (2) motion picture photoplays. Said photoplays are hereinafter for convenience referred to as "the pictures".

* * * * * * *

5. The first of the pictures shall be delivered to us not later than six (6) months after the date hereof, and the remaining picture shall be delivered not later than twelve (12) months from the date hereof.

* * * * * * *

Appendix H

PLAINTIFFS' NO. 29—FOR IDENTIFICATION

November 19, 1947

Mr. Max Fink
c/o Fink, Rolston, Levinthal & Kent
6253 Hollywood Blvd.
Los Angeles 28, Calif.

Dear Max:

I am pleased to re-submit herewith for your perusal a draft of the proposed contract by and between Ambassador Pictures and us with respect to the production and distribution of two photoplays.

In accordance with our discussion relative to changes, you will note that changes and revisions have been made on pages 5, 6, 8, 9, 10, 19 and 35. I believe that the enclosure now conforms to our discussions relative to this contract.

* * * * * * *

Appendix I

PLAINTIFFS' NO. 24—FOR IDENTIFICATION

October 17, 1947.

Mr. Max Fink,
6253 Hollywood Blvd.,
Los Angeles, 28, California.

Dear Mr. Fink: Re: HILL OF THE HAWK—by Scott Odell

* * * * * * *

you asked me to give you the information that you need for drawing up the contracts for the motion picture sale of HILL OF THE HAWK:

As you know, the deal that I made with Mr. Chertok was for $25,000.00 cash and five percent of the net profits of the picture. Of course by the net profits of the picture, we mean the amount remaining after the deductions for distribution charges and the negative cost of the picture, and the amount spent for prints and advertising.

* * * * * * *

This contract may be assigned by Mr. Chertok to another person or corporation provided, of course, said person or corporation take over all of the obligations of the contract.

It is impossible for me to discuss all of the clauses in the contract until you draw the papers and send me a copy. If there is any point that needs clearing up at that time, we can make the necessary changes in the contract. But with this information you should be able to get the papers ready to send us next week. Please tell Mr. Chertok that the 8 copies of HILL OF THE HAWK he wanted are on the way to him.

* * * * * * *

Annie Laurie Williams

Appendix J

PLAINTIFFS' NO. 13—IN EVIDENCE

H. KOCH and SONS No. 742
Manufacturers of
The Original Aviation Luggage
73 Beale Street
San Francisco, California, Oct. 16, 1946

Pay to the order of
David Sebastian $30,000 00/100
The Sum of $30000 and 00 cts Dollars

Market-Ferry Office 11-153
American Trust Company
Head Office San Francisco
San Francisco, California

H. Koch and Sons
Rebecca Koch

* * * * * * *

Appendix K

PLAINTIFFS' NO. 10—IN EVIDENCE

Murray P Koch Personal

Care Koch and Son 73 Beale St SFran=1946 Aug 4 PM 8 46

Kindly instruct David Sebastian return immediately. He bring 50,000. Will not give beacon until properly secured.

* * * * * * *

Appendix L

PLAINTIFFS' NO. 12—IN EVIDENCE

$50,000.00 Los Angeles, Calif., August 31, 1946

.....after date, for value received BEACON PICTURES CORPORATION promise to pay to MURRAY P. KOCH or order at Los Angeles, California Fifty Thousand and 00/100 Dollars.

* * * * * * *

Appendix M

PLAINTIFFS' NO. 14—IN EVIDENCE

$30,000.00 Los Angeles, Calif., October 17, 1946

.....after date, for value received BEACON PICTURES CORPORATION promise to pay to MURRAY P. KOCH or order at Los Angeles, California Thirty Thousand and 00/100 Dollars.

* * * * * * *

Appendix N

PLAINTIFFS' NO. 16—IN EVIDENCE

THIS AGREEMENT entered into on the 31 day of August, 1946, between MURRAY P. KOCH, hereinafter referred to as "Lender", and BEACON PICTURES CORP., a corporation, hereinafter referred to as "Beacon".

* * * * * * *

Appendix O

PLAINTIFFS' NO. 17—IN EVIDENCE

Mr. Murray P. Koch
Los Angeles, California

Dear Mr. Koch:

This letter will supplement, amend and/or modify that certain agreement between us dated August 31, 1946, pursuant to which you loaned to us the sum of $50,000.00. You have agreed to lend or advance to us concurrently with the execution of this supplemental agreement, and we hereby acknowledge receipt thereof, an additional sum of $30,000.00, making a total loan of $80,000.00; said additional $30,000.00 to be used for the same purposes and pursuant to the same terms and conditions set forth in the aforesaid agreement dated August 31, 1946. Our agreement, therefore, is as follows:

* * * * * * *

Appendix P

PLAINTIFFS' NO. 6—IN EVIDENCE

MAURICE P. KOCH 23815H
73 Beale Street No. 0274
San Francisco, Calif., April 25, 1946

Pay to the order of
David A. Sebastian $15,000 00/100
Fifteen-thousand——————00/100 Dollars

Pacific National Bank
of San Francisco H. Koch & Sons
11-39 San Francisco, Calif. Maurice P. Koch

* * * * * * *

Appendix Q

PLAINTIFFS' NO. 8—IN EVIDENCE

H. KOCH and SONS No. 23822
Manufacturers of
The Original Aviation Luggage
73 Beale Street
San Francisco, Cal., May 22, 1946

Pay to the order of
David Sebastian $2500 00/100
The Sum of $2500 and 00 cts Dollars
To
Pacific National Bank of San Francisco
H. Koch and Sons
11-39 San Francisco, Cal. Maurice P. Koch

* * * * * * *

Appendix R

PLAINTIFFS' NO. 10A—IN EVIDENCE

H. KOCH and SONS No. 24004
Manufacturers of
The Original Aviation Luggage
73 Beale Street
San Francisco, Cal., Aug. 5, 1946

Pay to the order of
David A. Sebastian $50,000 00/100
The Sum of $50,000 and 00 cts Dollars

To
Pacific National Bank of San Francisco
H. Koch and Sons
11-39 San Francisco, Cal. Rebecca Koch

* * * * * * *

Stub:

Date	Description	Amount
8/5	In line with understandings arrived at re Copacabana picture	
	Total	50,000 00